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CASE NBR 85-1-05141 CSY
SHORT TITLE De Garmo, Roger
VERSUS Texas

DOCKETED: Jul 22 1985

Date	Proceedings and Orders
Jun 13 1985	Application for extension of time to file petition and order granting same until July 23, 1985 (White, June 14, 1985).
Jul 22 1985	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
Jun 25 1985	Application for stay (A-967) filed with White, J. and order granting same on 06/26/85.
Aug 26 1985	Order extending time to file response to petition until September 20, 1985.
Sep 20 1985	Brief of respondent Texas in opposition filed.
Sep 26 1985	DISTRIBUTED. October 11, 1985
Oct 15 1985	REDISTRIBUTED. October 18, 1985
Oct 21 1985	REDISTRIBUTED. November 1, 1985
Nov 4 1985	The petition for a writ of certiorari is denied. Dissenting opinion by Justice Brennan with whom Justice

CONTINUE (

PROCEEDINGS AND ORDERS DATE: 110785

CASE NBR 85-1-05141 CSY
SHORT TITLE De Garmo, Roger
VERSUS Texas

DOCKETED: Jul 22 1985

Date	Proceedings and Orders
Nov 4 1985	The petition for a writ of certiorari is denied. Dissenting opinion by Justice Brennan with whom Justice Marshall joins. (Detached opinion.)

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85-5141

No. A-967

IN THE

SUPREME COURT OF THE UNITED STATES

RECEIVED
JUL. 22. 1985
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SUPREME COURT, U.S.

ROGER LeROY DeGARMO, A/K/A QUINTON EARL COMBEST,

Petitioner

V.

STATE OF TEXAS,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

Petitioner, Roger LeRoy DeGarmo, a/k/a Quinton Earl Combest, files this his Petition For Writ of Certiorari To the Texas Court of Criminal Appeals.

SCHWARTZ, KALINOWSKI & HARTFIEL
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Phone: 713-342-2806

By: Ken Hartfiel
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Attorney for Petitioner
Bar #09155500

OF COUNSEL:
Don T. Schwartz
Don T. Schwartz
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18 pp

I.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the holding of the Texas Court of Criminal Appeals that Petitioner waived his right to contest the sufficiency of the evidence is in conflict with this Court's opinions in Burks v. United States, 437 U.S. 1 (1978) and Greene v.Massey, 437 U.S. 19 (1978).

2. Did the consummation of the plea bargain agreement between the State and Petitioner's Co-Defendant some eighteen (18) months after Petitioner's trial deprive Petitioner of his right for the jury to know about any agreement between the prosecution and the Co-Defendant?

3. Is the punishment of Petitioner, who received the death penalty, so arbitrary, capricious and disproportionate in light of that of his Co-Defendant, who was placed on probation and the proceedings against her deferred for ten (10) years, as to constitute cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments?

II.

LIST OF PARTIES

Roger LeRoy DeGarmo a/k/a Quinton Earl Combest

The State of Texas

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V.

OPINIONS

Roger DeGarmo, a/k/a Quinton Earl Combest v. The State of Texas, No. 69,027, (Tex. Cr. App. 1985)

VI.

STATEMENT OF THE GROUNDS ON WHICH JURISDICTION IS INVOKED

1. Date of Judgment: March 13, 1985, Court of Criminal Appeals of Texas.

2. Rehearing denied, April 24, 1985, Court of Criminal Appeals of Texas.

3. Order Extending Time To File Petition For Writ Of Certiorari, June 14, 1985, by Associate Justice White. (Time extended to and including July 23, 1985).

4. Supreme Court Rule 17.

28 U.S.C. 1257 (3)

VII.

CONSTITUTIONAL PROVISIONS

Eighth Amendment, United States Constitution:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Fourteenth Amendment, United States Constitution, Section 1:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

VIII.

STATEMENT OF THE CASE

Petitioner, Roger LeRoy Degarmo, was convicted by a jury in the 240th District Court of Fort Bend County for the kidnapping and murder of Kimberly Ann Strickler. Evidence adduced at trial showed that Petitioner and Helen Mejia, who was also indicted for capital murder, abducted Ms. Strickler at a shopping center parking lot in Houston, Texas, placed her in the trunk of her car, and drove her to a rural area southwest of Houston, where, at Mejia's urging, Petitioner shot Ms. Strickler to death.

Helen Mejia testified for the State in Petitioner's trial. Her attorney testified that the State had made no promises to her in exchange for her testimony, except that she would not be prosecuted for capital murder. Approximately eighteen (18) months after Petitioner's trial, Helen Mejia and the Fort Bend County District Attorney's Office entered into a plea bargain agreement that provided in exchange for a plea of guilty to the offense of murder, Helen Mejia was placed on probation and the proceedings against her were deferred for a period of ten (10) years.

Petitioner testified at the punishment phase of his trial, admitted his guilt, and demanded that the jury assess his punishment as death by lethal injection.

Petitioner appealed his conviction to the Texas Court of Criminal Appeals. The Texas Court of Criminal Appeals affirmed Petitioner's conviction on March 13, 1985, and denied his Motion for Rehearing on April 24, 1985.

The questions presented for review in this Petition were raised in Petitioner's brief in the Court of Criminal Appeals of the State of Texas, No. 69,027, Roger DeGarmo, Appellant Vs. the State of Texas, Appellee. The questions were presented as Grounds of Error and were rejected by the Court of Criminal Appeals of the State of Texas in its opinion delivered March 13, 1985, a copy of which is included in the Appendix to this petition.

IX.

REASONS FOR ALLOWANCE OF THE WRIT

The Writ should be allowed because this is a death penalty case in which there are serious constitutional questions to be answered.

This Court should decide whether the Texas rule that a criminal defendant who does not testify at the guilt stage of his trial but does make a judicial confession at the punishment phase cannot question the sufficiency of the evidence on appeal, Lasker v. State, 573, S.W. 2d 539 (Tex. Cr. App. 1978), Garcia v. State, 522 S.W. 2d 203 (Tex. Cr. App. 1978), Boothe v. State, 474 S.W. 2d 219 (Tex. Cr. App. 1971) conflicts with this Court's opinions in Burks v. United States, 437 U.S. 1 1978) and Greene v. Massey, 437 U.S. 19 (1978). Burks and Greene hold that a reversal for insufficient evidence entitled the Appellant to an acquittal. These cases require that in testing the sufficiency of the evidence on appeal, the Appellate Court must evaluate the evidence as it was presented to the jury in deciding the guilt or innocence of the accused. The Texas rule places the accused in a position of either remaining silent and testing the sufficiency of the evidence on appeal, or taking the stand and allowing the State to use his testimony at the punishment phase to make up for its otherwise insufficient case. The Texas rule is especially onerous in Texas' bifurcated system because after conviction, the Defendant often takes the stand at the punishment stage of the proceedings.

The second reason this Court should allow the Writ is because the prosecution's handling of the plea bargain agreement with the Petitioner's Co-Defendant denied him of his right to have the jury know about any agreement or understanding that might have existed between said Co-Defendant and the prosecution. Giglio v. United States, 405 U.S. 150 (1972). The Co-Defendant's attorney testified that the only agreement or understanding between his client and the prosecution was that she would not be prosecuted for capital murder. Eighteen (18) months later, the Co-Defendant, who was originally charged with capital murder, plead guilty, was placed on probation and the proceedings against her were deferred for ten (10) years. The jury had a right to know about this arrangement. Permitting the State to deny that an agreement existed, and then permitting the State to give the Co-Defendant a remarkable lenient punishment of which the jury was not aware, denied the Petitioner his right of confrontation. Also, the fact that the State delayed approximately eighteen (18) months before disposing of the Co-Defendant's case smacks of

an intentional, planned course of conduct to deny Petitioner his right of confrontation.

The third reason for this Court to allow the Writ is because the punishment of Petitioner at death, while his Co-Defendant was placed on probation, is so disproportionate as to be violative of the Eighth and Fourteenth Amendments. Furman v. Georgia, 408 U.S. 238 (1972). A system which allows such systemic arbitrariness and capriciousness and permits the sentence of death to be so wantonly and freakishly imposed, should not be tolerated. The Writ should be allowed to permit appellate review to eliminate such disproportionality and arbitrariness in punishment. Failure to provide for such review vests essentially unfettered discretion in prosecutors to impose the death penalty, which is a defect in the statutory scheme of the type invalidated by Furman and prohibited by the Eighth and Fourteenth Amendments.

Given the extreme nature of the punishment in Petitioner's case and the importance of the constitutional questions posed herein, Petitioner urges this Court to accept his case for review and grant his Petition For Writ of Certiorari To The Texas Court of Criminal Appeals.

A-967

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

ROGER LeROY DeGARMO, A/K/A QUINTON EARL COMBEST,

Petitioner

v.

THE STATE OF TEXAS,

Respondent

CERTIFICATE OF SERVICE

I, Ken Hartfiel, Attorney for Roger LeRoy DeGarmo, a/k/a/ Quinton Earl Combest, Petitioner in the above cause, certify that a true and correct copy of Petitioner's Motion For Leave To Proceed In Forma Pauperis, Affidavit of Counsel, Affidavit of Poverty, and Petition For Writ of Certiorari to the Texas Court of Criminal Appeals was mailed to the Hon. Jim Mattox, Attorney General of Texas, P. O. Box 12548, Capitol Station, Austin, Texas, 78711, Mr. Thomas F. Lowe, Clerk, Court of Criminal Appeals, P. O. Box 12308, Capitol Station, Austin, Texas, 78711, and Mr. William A. Meitzen, District Attorney, Fort Bend County Courthouse, Richmond, Texas, 77469, by Certified Mail, Return Receipt Requested, on this the 22nd day of July, 1985.

Ken Hartfiel

SWORN TO AND SUBSCRIBED BEFORE ME, by the said Ken Hartfiel, this 22nd day of July, 1985, to certify which witness my hand and seal of office.

NOTARY PUBLIC, STATE OF TEXAS

My Commission Expires: BARBARA GIBSON NOTARY PUBLIC MY COMMISSION EXPIRES 7-2-88

No. A-967

IN THE

SUPREME COURT OF THE UNITED STATES

ROGER LeROY DeGARMO, A/K/A QUINTON EARL COMBEST,

Petitioner

V.

STATE OF TEXAS,

Respondent

STATEMENT PURSUANT TO RULE 28.2

I, Don T. Schwartz, hereby state that I am a member of the Bar of this Court, that Petitioner's Motion For Leave to Proceed In Forma Pauperis, Affidavit of Counsel, Affidavit of Poverty, and Petition For Writ of Certiorari to the Texas Court of Criminal Appeals was deposited in the United States Post Office at Rosenberg, Texas, 77471, with first class postage prepaid, and properly addressed to the Clerk of the Supreme Court of the United States, within the time allowing for filing of same, on the 22nd day of July, 1985, and to my knowledge that the mailing of said documents took place on that date and within the permitted time for filing said documents.

Don T. Schwartz
Bar #17862000

SWORN TO AND SUBSCRIBED BEFORE ME by the said Don T. Schwartz, this 22nd day of July, 1985, to certify which witness my hand and seal of office.

NOTARY PUBLIC, STATE OF TEXAS

BARBARA GIBSON NOTARY PUBLIC MY COMMISSION EXPIRES 7-2-88

My Commission Expires:

APPENDIX

Copy of opinion of Court of Criminal Appeals of Texas, No. 69,027, Roger DeGarmo, a/k/a Quinton Earl Combest vs. The State of Texas (March 13, 1985).

ROGER DE GARMO, aka QUINTON EARL COMBEST,
Appellant
NO. 69,027 vs. - - - APPEAL FROM FORT BEND COUNTY

THE STATE OF TEXAS, Appellee

O P I N I O N

Roger De Garmo, aka Quinton Earl Combest, appellant, murdered Kimberley Anne Strickler, a young lady who was only twenty (20) years of age at the time of her untimely death. After finding appellant guilty of capital murder, the jury returned affirmative findings to special issues that were submitted to it by the trial judge pursuant to Art. 37.071 (b), V.A.C.C.P. Based upon the jury's answers, the trial judge assessed appellant's punishment at death.

Appellant was accompanied and assisted by an accomplice--Helen Leydalia Mejia--when he kidnapped and later murdered Strickler. Mejia testified for the State. As a result of a plea bargain agreement with the prosecution, but after appellant's trial, Mejia received ten (10) years' deferred probation for her participation in the abduction and murder of Strickler.

We affirm appellant's conviction and sentence of death.

We overrule appellant's challenge to the sufficiency of the evidence to sustain the jury's verdict finding him guilty of capital murder.

The record on appeal reflects that appellant and Mejia kidnapped Strickler in Harris County after she befriended them by giving them a ride in her automobile. Appellant later forced Strickler to get inside the trunk of her motor vehicle, after which he closed and locked the trunk lid. Later, after driving to a location in Fort Bend County, appellant opened the trunk lid of Strickler's vehicle. Acting with a state of mind which showed a heart regardless of social duty and fatally bent on mischief, appellant then deliberately and intentionally fired one bullet from a pistol into Strickler's head, which wound caused Strickler to die almost instantaneously. Because appellant intentionally murdered Strickler in the course of committing the offense of kidnapping, he is guilty of capital murder. See V.T.C.A., Penal Code, Section 19.03 (a) (2).

When he testified, appellant also threatened the jurors with death if they answered the special issues submitted to them in such a way that he, appellant, would only receive life imprisonment. He told the jurors that if that happened, i.e., that if he only received a life sentence, he would eventually, either acting individually or in conspiracy with others, cause each juror to die, or, if the juror was no longer alive, he would cause members of the juror's family to die. Appellant made no bones about what he intended to do if the jury's verdict did not result in him receiving the death penalty: "I'm not threatening, I'm promising that if and when some catastrophe happens and I was put back on the street, if you are not available, somebody of your possession would be and I would just say my statement is you should give me the death penalty because that's the only way you're ever going to stop me because you have put me in this position. . . I'm going to die any way, so why not take with me some of the people that's going to make me die. That's the way I feel. . . so you better . . . put the 'Yes' on both of them questions from my point of view."

And the record reflects that the jurors did as appellant requested--they answered both special issues in the affirmative, which caused the death penalty to become the only penalty that the trial judge could assess.

In asserting that the evidence is insufficient to sustain the jury verdict finding him guilty of capital murder, appellant acknowledges that the present law in Texas is that if a defendant does not testify at the guilt stage of the trial, but does testify at the punishment stage of the trial, and admits his guilt to the crime for which he has been found guilty, he has, for legal purposes, entered the equivalent of a plea of guilty. The law as it presently exists is clear that such a defendant not only waives a challenge to the sufficiency of the evidence, but he also waives any error that might have occurred during the guilt stage of the trial. In this instance, appellant unequivocally admitted his guilt to the capital murder of

Glasser v. United States, 315 U.S. 60, 80, 62 S.Ct. 457, 86 L.Ed. 680 (1942); United States v. Berry, 670 F.2d 583, 588 (5th Cir.1982); Sutherlin v. State, 682 S.W.2d 546, 548-549 (Tex.Cr.App.1984).

Notwithstanding that we find and hold that appellant's admissions that were made at the punishment stage of the trial constitute waiver of his challenge to the sufficiency of the evidence, we have carefully reviewed the evidence, and have done so without even considering Mejia's testimony, and find that circumstantially[1/] the evidence is more than sufficient to sustain the verdict of the jury, and would permit a rational trier of fact to find guilt beyond a reasonable doubt. Appellant's ground of error that the evidence is insufficient to sustain the capital murder verdict of the jury is overruled.[2/]

Appellant asserts in his second ground of error that "one on trial for his life should not be subject to a conviction and a death penalty when his co-defendant, and the principal witness against him, (subsequently) receives a sentence of remarkable leniency, and the jury is not informed of that fact."

We find that appellant's contention centers upon the fact that almost eighteen months after appellant's trial, the office of the local district attorney entered into a plea bargain agreement with Mejia that was consummated when the trial judge approved the agreement. The plea bargain agreement that was placed into effect provided that in exchange for a plea of guilty to the lesser offense of murder, Mejia was placed on adult probation and the proceedings against her were deferred for a period of ten (10) years.

Considering the active role that Mejia played throughout the ordeal that Strickler was put through prior to appellant needlessly shooting her in the head, and her participation in the robbery and abduction of Moers, and notwithstanding Mejia's claim that she acted at all times under some form of duress, we are inclined to agree with appellant that the punishment Mejia received is relatively light.

[1/] The jury was instructed that this was "a case depending for conviction on circumstantial evidence," and was also instructed on the law of circumstantial evidence. In Hankins v. State, 646 S.W.2d 191, 197 (Tex.Cr.App. 1981) (On State's Motion for Rehearing), this Court held that even when a case is dependent upon circumstantial evidence for conviction, an instruction on the law of circumstantial evidence no longer must be given by the trial court.

[2/] In Adams v. State, -S.W.2d- (Tex.Cr.App. 1985), delivered February 27, 1985, this Court rejected the assertion that appellant makes in this cause, that when the prosecution uses an accomplice witness to establish its case against the accused, the sufficiency of the evidence must be reviewed by examining the evidence independent of the accomplice witness' testimony in order to make the determination whether the evidence is sufficient beyond a reasonable doubt to convict the defendant of the crime which he is accused of committing.

Although we believe that it was probably obvious to the jury that in addition to not being charged with the offense of capital murder, Mejia had the hope or expectation that at some time in the future the State would recommend some specific form of leniency as to punishment, nevertheless, we do not find anything in the record on appeal that would reflect or indicate that the jury was misled into believing that, in addition to what they were informed, there might have been some other "deal," "arrangement," or "tacit understanding" that might have existed between Mejia and the local prosecuting attorney when Mejia testified against appellant.

Appellant also appears to argue under this ground of error that because Mejia, his co-defendant, was assessed a punishment that was what he claims disproportionate to his sentence of death that this, without more, is violative of the Eighth Amendment to the Federal Constitution. We disagree.

The death penalty that appellant has been assessed is not cruel and unusual punishment. Jurek v. Texas, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976). There is no constitutional requirement that a co-defendant who testifies for the prosecution must receive the same punishment as the defendant has received, nor is there any constitutional requirement that a comparative proportionality review of appellant's death sentence must be made by an appellate court. Pulley v. Harris, 465 U.S.-, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984).

Appellant's second ground of error is overruled.

Appellant asserts in his third and last ground of error that the trial court erred when it, over objection, refused to delete the following underscored portion from the first special issue that the jury was asked to answer: "Do you find from the evidence beyond a reasonable doubt that the conduct of the Defendant, Roger Leroy DeGarmo, that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the

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Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

ORIGINAL

NO. 85-5141

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1984

ROGER LEROY DEGARMO,
A/K/A QUINTON EARL COMBEST,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

On Petition For Writ Of Certiorari
To The Texas Court Of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. WHETHER THE TEXAS RULE THAT AN ADMISSION OF GUILT AT THE PUNISHMENT PHASE OF THE TRIAL WAIVES THE RIGHT TO CHALLENGE THE SUFFICIENCY OF THE EVIDENCE ON APPEAL DEPRIVES PETITIONER OF A MEANINGFUL APPEAL IN VIOLATION OF THE FOURTEENTH AMENDMENT?

II. WHETHER THE JURY WAS PROPERLY INFORMED OF THE PLEA BARGAIN BETWEEN A CO-DEFENDANT AND THE STATE, THUS NOT DEPRIVING HIM OF HIS SIXTH AMENDMENT RIGHT OF CONFRONTATION?

III. WHETHER, IN VIEW OF THE FACT THAT PETITIONER'S CO-DEFENDANT RECEIVED A TEN-YEAR PROBATED SENTENCE, PETITIONER'S DEATH SENTENCE CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT?

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NO. 85-5141

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1984

ROGER LEROY DEGARMO,
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Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

On Petition For Writ Of Certiorari
To The Texas Court Of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES the State of Texas, Respondent herein, by and through its attorney, the Attorney General of Texas, and files this Brief in Opposition.

OPINION BELOW

The opinion of the Court of Criminal Appeals of Texas, which is published at 691 S.W.2d 657 (Tex. Crim. App. 1985), is reproduced as the Appendix to the Petition for Writ of Certiorari. The Texas Court of Criminal Appeals denied the Motion for Rehearing on April 24, 1985.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court under the provisions of 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner bases his claims upon the sixth, eighth and fourteenth amendments to the United States Constitution.

STATEMENT OF THE CASE

The record reflects that Petitioner was indicted for the murder of Kimberly Ann Strickler while in the course of kidnapping Ms. Strickler. He was tried in the 240th District Court of Fort Bend County, Texas, on March 24-26, 1980. After a punishment hearing, the jury answered affirmatively the special issues submitted pursuant to Tex. Code Crim. Proc. Ann. art. 37.071 (Vernon 1981). Accordingly, punishment was assessed at death. Petitioner appealed his conviction and sentence to the Texas Court of Criminal Appeals which, on March 13, 1985, affirmed the conviction and sentence. DeGarmo v. State, No. 69,027 (Tex. Crim. App. March 13, 1985) (en banc). Rehearing was denied on April 24, 1985.

STATEMENT OF FACTS

The statement of facts set forth in the Petition for Writ of Certiorari is essentially correct.

SUMMARY OF ARGUMENT

There are no special or important reasons to review this case. The Texas waiver rule does not unconstitutionally infringe on the exercise of a criminal defendant's rights. The state may legitimately require a defendant to forego one constitutional right by exercising another one. Texas' waiver rule does not go this far, however, because it does not involve an election between two constitutional rights. Moreover, even though the waiver rule could have been applied in this case, the Texas Court of Criminal Appeals did not do so, but reviewed the sufficiency of the evidence.

Petitioner's sixth amendment right to confront the witnesses against him was not violated when the jury was fully informed of the extent of the plea bargain between the state and Petitioner's co-defendant at the time the co-defendant testified. That the

plea negotiations were not fully completed until many months after Petitioner's trial does not show a violation of his constitutional rights.

Finally, the Texas capital punishment statute has been approved in the face of constitutional attack. Jurek v. Texas, 428 U.S. 262 (1976). The fact that prosecutors have discretion in deciding who to prosecute for capital offenses is merely a manifestation of the traditional role of the prosecuting authority, and not a violation of the eighth and fourteenth amendments.

REASONS FOR DENYING THE WRIT

I.

THE QUESTIONS PRESENTED FOR REVIEW ARE UNWORTHY OF THIS COURT'S ATTENTION.

Rule 17 of the Rules of the Supreme Court provides that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. Petitioner has advanced no special or important reason in this case, and none exists.

II.

THE TEXAS WAIVER RULE DOES NOT VIOLATE THE FOURTEENTH AMENDMENT.

Petitioner contends that the Texas waiver rule unconstitutionally infringes upon his right to testify on his own behalf and to present mitigating evidence at punishment. The rule to which Petitioner refers is a Texas rule of appellate procedure holding that where a criminal defendant testifies on his own behalf at punishment and judicially confesses to the crime, he waives review of the sufficiency of the evidence at the guilt phase of trial. Brown v. State, 617 S.W.2d 234 (Tex. Crim. App. 1981); Smyth v. State, 643 S.W.2d 721 (Tex. Crim. App. 1982).

The Constitution does not forbid every government imposed choice in the criminal process that has an effect of discouraging the exercise of constitutional rights:

> The criminal process, like the rest of the legal system, is replete with situations

> requiring "the making of difficult judgments" as to which course to follow. Although a defendant may have a right, even of constitutional dimension, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose. The threshold question is whether compelling the election impairs to an appreciable extent any of the policies behind the rights involved.

Crampton v. Ohio, reported sub. nom., McGautha v. California, 402 U.S. 183, 213 (1971) (The right to remain silent is not unconstitutionally burdened by a state statute requiring a single trial in a capital murder case because it precludes the defendant from making a personal plea for mercy at punishment without risking incrimination on the question of guilt). See South Dakota v. Neville, 459 U.S. 553 (1983) (Neither privilege against self-incrimination nor due process is violated by requiring defendant to choose between taking a blood test or having his refusal used against him in court); Guenther v. Holmgreen, 738 F.2d 879 (11th Cir. 1984) (A full and fair opportunity to litigate a fourth amendment claim is not denied by requiring a defendant to choose between meaningful exercise of the privilege against self-incrimination and litigation of a § 1983 claim); Ryan v. Montana, 580 F.2d 988 (9th Cir. 1978) (Forcing defendant to assume the risk that statements made at a probation revocation and sentencing hearing will be used against him at a subsequent criminal trial is not violative of the Constitution). Cf., Jenkins v. Anderson, 447 U.S. 232 (1980) (Right to remain silent is not violated when a defendant who testifies in his own defense is impeached with evidence of pre-arrest silence); Harris v. New York, 401 U.S. 222 (1971) (Privilege against self-incrimination is not violated by impeachment with constitutionally defective confessions). Thus, requiring a criminal defendant to choose between exercising one constitutional right at the risk of restricting another is not necessarily violative of due process, as these cases indicate.

Petitioner contends that the Texas waiver rule operates to force him to choose between preserving for appeal a claim of

insufficiency of evidence at trial or to forego his right to make a personal plea for mercy to the jury. The right of a criminal defendant to seek appellate review of his trial is not a right to constitutional dimension, but rather a state created right. Evitts v. Lucey, ___ U.S. ___, 105 S.Ct. 830 (1985); Jones v. Barnes, 463 U.S. 745 (1983); McKane v. Durston, 153 U.S. 684 (1894). Being such, it is constitutionally permissible for the states to impose restrictions as long as those restrictions comport with due process. Evitts v. Lucey, ___ U.S. at ___, 105 S.Ct. at 834.

Due process requires a state that has afforded a right of appeal to make that appeal more than a "meaningless ritual." To that end, a state may not deprive a defendant of the opportunity to make an effective appeal. Ross v. Moffitt, 417 U.S. 600, 616 (1974). Nor may a defendant be deprived of effective assistance of counsel on appeal. Evitts v. Lucey, ___ U.S. at ___, 105 S.Ct. at 836. However, due process does not encompass a constitutional right to compel appointed counsel to raise every non-frivolous ground of error. Jones v. Barnes, 463 U.S. at 745. The state rule requiring Petitioner to make an election does not require Petitioner to forego one constitutional right over the exercise of another.[1]

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[1]The Texas waiver rule is strikingly similar to Fed.R.Civ.P., Rule 29(a). Under Rule 29(a), if a defendant moves for acquittal at the close of the government's case and the motion is denied, the defendant is faced with the choice of either to stand on his own motion hoping for an acquittal or to put on a defense taking the risk that he will bolster the government's case enough7 to support a verdict of guilty. I' he moves forward with a defense, he cannot on appeal complain of the erroneous denial of his motion for acquittal. United States v. Perez, 638 F.2d 862, 870 (5th Cir. 1981); United States v. Parr, 516 F.2d 458, 464 n.11 (5th Cir. 1975). This rule, like the Texas rule, requires the defendant to make a difficult strategic choice which will necessarily result in relinquishment of his right to present evidence on his behalf in order to preserve his appellate posture. This rule, again like the Texas rule, has received some judicial criticism; however, it has not been found to be constitutionally impermissible.

In addition, this is not a proper case to consider the operation of the Texas waiver rule. During the punishment phase of the trial, Petitioner did testify and admit his guilt (SF VII 29-36). On appeal, he challenged the sufficiency of the evidence to convict him. The Texas Court of Criminal Appeals declined the invitation to abandon its waiver rule but, nonetheless, did apply it in Petitioner's case. Although acknowledging that Petitioner's admissions at the punishment phase of the trial constituted a waiver of any attack on the sufficiency of the evidence, the court went on to review all of the evidence, excluding Petitioner's confession and the testimony of his co-defendant. Thus, the decision to testify at punishment did not deprive Petitioner of appellate review of the sufficiency of the evidence against him.

III.

PETITIONER WAS NOT DENIED HIS RIGHT TO HAVE THE JURY KNOW ABOUT THE PLEA BARGAIN ARRANGEMENT BETWEEN THE STATE AND HIS CO-DEFENDANT.

Petitioner's co-defendant, who was originally also charged with capital murder, testified for the state. Both she and her attorney testified that the state had agreed not to prosecute her for capital murder. Some eighteen months after Petitioner's trial, the state and the co-defendant concluded plea negotiations and the co-defendant pled guilty to murder, was placed on probation, and the proceedings against her were deferred for ten years. Petitioner maintains that this situation violated his right to have the jury informed of any agreement between the co-defendant and the state.

Under Giglio v. United States, 405 U.S. 150 (1972), the jury must be told of any agreement between the state and its witnesses concerning future prosecution. This allows the jury to consider the agreement in assessing the credibility of the witnesses' testimony. In this case, the record reflects that the jury was fully informed of the extent of the agreement between the state and the co-defendant when she testified. Nothing indicates that

the plea bargain which the co-defendant eventually accepted had been agreed to or even discussed at the time of Petitioner's trial. Petitioner has pointed to nothing which indicates that anything less than the full details of the bargain were disclosed to the jury. Moreover, Giglio has not been extended so far that the state is obligated to conclude plea bargaining with any witnesses against whom charges have been or might be brought before the witness can testify on the state's behalf. Petitioner has not shown that the circumstances complained of denied him his right to confront the witnesses against him.

IV.

THE DIFFERENCE IN THE SENTENCES RECEIVED BY PETITIONER AND HIS CO-DEFENDANT DID NOT VIOLATE THE EIGHTH AND FOURTEENTH AMENDMENTS.

Petitioner asserts that his receiving the death penalty while his co-defendant was placed on probation is grossly disproportionate and violative of the eighth and fourteenth amendments. He also complains that the prosecutor's discretion as to who will be prosecuted for capital murder results in the death penalty being imposed in an arbitrary and capricious manner.

The disproportionality argument was rejected in Pulley v. Harris, 465 U.S. ___, 104 S.Ct. 871 (1984). Although the states are free to require proportionality review of death sentences, the Constitution does not mandate it; Id. at ___, 104 S.Ct. at 876. What is necessary to preserve the constitutionality of a capital punishment statute is a provision for finding statutory aggravating factors before imposing a sentence of death and mandatory appellate review once the sentence is assessed. Id. at ___, 104 S.Ct. at 878-79. The Texas capital punishment statute has been upheld on these grounds in Jurek v.Texas, 428 U.S. 262 (1976), and was reaffirmed in Pulley v. Harris, 465 U.S. at ___, 104 S.Ct. at 878-79.

Nor is a system which gives unfettered discretion to the prosecutor to determine who will be tried for a capital offense a violation of the eighth and fourteenth amendments. Gregg v.

Georgia, 428 U.S. 153, 199 (1976). It is the traditional function of the prosecutor to make such decisions and, absent a showing of vindictiveness or use of an arbitrary standard, the decisions are not subject to constitutional scrutiny. Bordenkircher v. Hayes, 434 U.S. 357 (1978). Petitioner's arguments have advanced nothing new which calls these decisions into question and which would require further review.

CONCLUSION

For these reasons, Respondent respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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EDITOR'S NOTE

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SUPREME COURT OF THE UNITED STATES

ROGER DEGARMO *v.* TEXAS

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

No. 85-5141. Decided November 4, 1985

The petition for writ of certiorari is denied.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

In *Gregg* v. *Georgia*, 428 U. S. 153 (1976), six Justices concluded that a capital sentencing scheme that directs and limits the jury's discretion minimizes the risk of arbitrary and freakish imposition of the death penalty and thereby cures the defects that led the Court in *Furman* v. *Georgia*, 408 U. S. 238 (1972), to invalidate capital punishment as unconstitutionally cruel and unusual. I dissented in *Gregg* because I do not believe that the unconstitutionality of capital punishment depends upon the procedures under which the penalty is inflicted. In my view, the constitutional infirmity in the punishment of death is that "it treats members of the human race as nonhumans, as objects to be toyed with and discarded" and is thus "inconsistent with the fundamental premise of the [Eighth Amendment] that even the vilest criminal remains a human being possessed of common human dignity." *Gregg*, *supra*, at 230 (BRENNAN, J., dissenting) (quotations omitted).

I have adhered to this view that capital punishment is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments. I do so again today. But even if I agreed that capital punishment is constitutional if imposed in a rational and nondiscriminatory manner, I remain convinced that the Court deludes itself when it insists that the infliction of the death penalty, as currently administered, is not arbitrary or capricious under any

meaningful definition of those terms. See *Pulley* v. *Harris*, —— U. S. ——, —— (1984) (BRENNAN, J., dissenting). This case demonstrates just one way in which capital sentencing schemes have failed to eliminate arbitrariness in the choice of who is put to death.

With the aid of Helen Mejia, Roger DeGarmo kidnapped and murdered a young woman. DeGarmo was subsequently convicted of capital murder and condemned to die by lethal injection. As part of a plea bargain, Mejia—whose participation made her equally subject to prosecution under the capital murder statute—received a sentence of only 10 years' deferred probation. In other words, while the State sought and may soon succeed in putting DeGarmo to death, it did not care to see his accomplice serve even a day in jail for participating in the same offense. This gross disparity in treatment is solely a product of the prosecutor's unfettered discretion to choose who will be put in jeopardy of life and who will not.*

*Although Mejia testified for the State at trial, the prosecutor's decision to let her go free was not needed to obtain DeGarmo's conviction. Mejia's plea and sentence were not entered until over 18 months after DeGarmo's trial. On appeal, DeGarmo alleged that the State had offered this remarkably lenient deal to Mejia *before* his trial to persuade her to testify. DeGarmo argued that the prosecutor's failure to disclose this promise violated his right to have the agreement disclosed to the jury. See *Giglio* v. *United States*, 405 U. S. 150 (1972). The State responded that the agreement to let Mejia off on probation was made after DeGarmo's trial and that, at the time of the trial, Mejia was promised only that she would not be prosecuted for capital murder. Without a hearing and based solely on the record on appeal, the Texas Court of Criminal Appeals accepted the State's version of the facts. Of course, DeGarmo may raise this claim again in federal habeas proceedings, and, if the district judge so orders, may obtain a hearing to show that such was not the case. See 42 U. S. C. § 2254(d). However, in the absence of contrary findings, I accept the conclusions of the State Courts. Based on these facts, the decision not to seek at least imprisonment for Mejia while seeking the death penalty for DeGarmo is puzzling.

I believe that such a disparity in treatment is alone sufficient grounds to set aside DeGarmo's death sentence as disproportionate under the circumstances. Cf. *Pulley* v. *Harris*, *supra*, at ——; *Solem* v. *Helm*, —— U. S. —— (1983). More importantly, however, this disparity in treatment highlights the utter failure of the elaborate sentencing schemes approved by the Court in *Gregg* and its companion cases to meaningfully limit the arbitrary infliction of death by the states. When *Gregg* was decided several members of the Court expressed the belief that channeling juror discretion would minimize the risk that the death penalty "would be imposed on a capriciously selected group of offenders," thereby making it unnecessary to channel discretion at earlier stages in the criminal justice system. See *Gregg*, *supra*, at 199 (opinion of Stewart, POWELL, STEVENS, JJ.). But discrimination and arbitrariness at an earlier point in the selection process nullify the value of later controls on the jury. The selection process for the imposition of the death penalty does not begin at trial; it begins in the prosecutor's office. His decision whether or not to seek capital punishment is no less important than the jury's. Just like the jury, then, where death is the consequence, the prosecutor's "discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Id.*, at 189.

Instead, the decisions whether to prosecute, what offense to prosecute, whether to plea bargain or not to negotiate at all are made at the unbridled discretion of individual prosecutors. The prosecutor's choices are subject to no standards, no supervision, no controls whatever. There are, of course, benefits associated with granting prosecutors so much discretion, but there are also costs. Some of these costs are simply accepted as part of our criminal justice system. But if the price of prosecutorial independence is the freedom to impose death in an arbitrary, freakish or discriminatory manner, it is a price the Eighth Amendment will not tolerate. I dissent and would grant the petition in order to vacate the sentence below.